

NO. 14494

In the
United States
Court of Appeals
for the Ninth Circuit

BARTOLOMEO MONGE,

Appellant,

VS.

JAMES G. SMYTH, Collector of Internal Revenue
for the First District of California,

Appellee.

Brief for Appellant

Appeal from the United States District Court
for the Northern District of California,
Southern Division.

Wareham C. Seaman
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OPINION BELOW

The opinion of the United States District Court for the Northern District of California, Southern Division, is unreported, but a memorandum decision dismissing the original complaint is found in the transcript, page 25; an order dismissing the first amended complaint with leave to amend, (Tr. page 34), and an order of dismissal of the second amended complaint and of the entire action is found in the transcript, page 48.

JURISDICTIONAL STATEMENT

This appeal involves an injunction and rescission sought by the appellant pursuant to Sections 272(a) and 273(b), 1939 Internal Revenue Code, and jurisdiction was conferred on the court below under 28 U.S.C.A., Section 1340. Jurisdiction is conferred on this court by 28 U.S.C., Section 1291.

QUESTIONS PRESENTED

1. Whether appellant was entitled to an injunction because of the arbitrary and oppressive conduct of the defendant.
2. Whether a jeopardy assessment was made by the defendant against the appellant under Section 273(a), 1939 I.R.C., and, if so, whether the assessment was invalid.
3. Whether, under the rule of this court, defendant was required to issue a statutory notice under Section 272(a), 1939 I.R.C., and, on the failure to do so, the assessment was invalid, entitling the appellant to an injunction or rescission.

STATEMENT OF THE CASE

The original complaint, seeking an injunction on the ground of the arbitrary and oppressive conduct of the defendant, was filed on June 29, 1951 (Tr. page 3). Annexed thereto was an affidavit by appellant (Tr. page 7) and an affidavit by the attorney for appellant (Tr. page 15). A motion to dismiss by the defendant (Tr. page 20) was granted by the Court below which, in its opinion (Tr. page 25) found that there was not a showing of sufficient arbitrary and oppressive conduct to justify removal of the injunction from the prohibition of Section 3653(a), 1939 I.R.C. Prior to the dismissal of the original complaint, appellant filed a first amended complaint (Tr. page 21) on September 28, 1951, on the ground that the defendant had issued a jeopardy assessment pursuant to Section 273(a), 1939 I.R.C. which was invalid because of the failure to issue the statutory notice required under subsection (b) of the same section. The defendant's motion for summary judgment (Tr. page 27) was denied by the Court (Tr. page 31) on November 13, 1951. The answer of defendant to the first amended complaint (Tr. page 29) thereupon was filed on November 21, 1951.

Appellant filed an appeal before this court on the dismissal of the original complaint and denial of a request for rehearing, which appeal this Court, on September 3, 1952, found premature and ordered dismissed without prejudice (Tr. page 31). On

March 11, 1953, defendant filed a motion to dismiss the action and for summary judgment on the second amended complaint (Tr. page 33). On September 29, 1953, the Court below, in its memorandum and order (Tr. page 34) denied such motion on the action but did dismiss the amended complaint with leave to amend, because it felt that the complaint could be amended to remedy a deficiency in allegation; and the Court also vacated the restraining order against defendant which had theretofore been in force.

On October 20, 1953, Appellant filed a second amended complaint (Tr. page 36) restating the grounds of the original complaint and the first amended complaint and in such a form as to challenge the validity of the Waiver form 870-TS, upon which the assessment by defendant was based. Attached thereto was an affidavit by appellant (Tr. page 43). This second amended complaint as well as the action was dismissed by the Court (Tr. page 48) on June 30, 1954. A timely appeal was filed by appellant on July 21, 1954.

FACTS OF THE CASE

There has been no testimony taken by the Court below and no stipulation of facts. The only information available to the Court was that contained in the affidavits of appellant (Tr. page 7, 23 and 43) the affidavit of the attorney for appellant (Tr. page 15) and the appearances before the Court in

its hearings as noted above. The affidavits (Tr. pages 7, 15 and 23) most completely set forth the facts upon which appellant relies.

SPECIFICATION OF ERROR RELIED UPON

1. That the Court below erred in failing to find that the knowledge and conduct of the defendant was sufficiently arbitrary and oppressive to justify an injunction, notwithstanding Section 3653(a), 1939 I.R.C.

2. That the Court below should have permitted a hearing to determine whether the assessment against appellant was a jeopardy assessment under Section 273(a), 1939 I.R.C., and, if so, it should have found that the assessment was invalid under Section 273(b), 1939 I.R.C.

3. That the Court below erred in not following the rule of this Court that the Waiver form 870-TS, as provided in Section 272(d), 1939 I.R.C. is invalid without a determination and statutory notice issued by the defendant as provided in Section 272(a), 1939 I.R.C.

STATUTES INVOLVED

INTERNAL REVENUE CODE of 1939.

SECTION 272. PROCEDURE IN GENERAL.

(a) (1) *Petition to The Tax Court of the United States.*

If in the case of any taxpayer, the Commissioner determines that there is a deficiency in

respect of the tax imposed by this chapter, the Commissioner is authorized to send notice of such deficiency to the taxpayer by registered mail. Within ninety days after such notice is mailed (not counting Saturday, Sunday, or a legal holiday in the District of Columbia as the ninetieth day) the taxpayer may file a petition with the Tax Court of the United States for a redetermination of the deficiency. No assessment of a deficiency in respect of the tax imposed by this chapter and no distraint or proceeding in court for its collection shall be made, begun, or prosecuted until such notice has been mailed to the taxpayer, nor until the expiration of such ninety-day period, nor, if a petition has been filed with the Tax Court, until the decision of the Tax Court has become final. Notwithstanding the provisions of section 3653(a) the making of such assessment or the beginning of such proceeding or distraint during the time such prohibition is in force may be enjoined by a proceeding in the proper court.

(d) *Waiver of Restrictions.*

The taxpayer shall at any time have the right, by a signed notice in writing filed with the Commissioner, to waive the restrictions provided in subsection (a) of this section on the assessment and collection of the whole or any part of the deficiency.

SECTION 273. JEOPARDY ASSESSMENTS

(a) *Authority for Making.*

If the Commissioner believes that the assessment or collection of a deficiency will be jeopardized by delay, he shall immediately assess such deficiency (together with all interest,

additional amounts, or additions to the tax provided for by law) and notice and demand shall be made by the collector for the payment thereof.

(b) *Deficiency Letters.*

If the jeopardy assessment is made before any notice in respect of the tax to which the jeopardy assessment relates has been mailed under section 272(a), then the Commissioner shall mail a notice under such subsection within sixty days after the making of the assessment.

SUMMARY OF ARGUMENT

I.

The affidavits set forth sufficient allegations to justify a finding that the action of defendant in making the assessment and levying against appellant was arbitrary and oppressive.

II.

The defendant's assessment against appellant was a jeopardy assessment, pursuant to Section 273(a), 1939 I.R.C., and was invalid because of his failure to issue a statutory notice as required by Section 273(b), 1939 I.R.C.

III.

The assessment made by defendant was invalid under the rule of this Court because there was no determination before signing nor was there issuance of the statutory notice by defendant.

ARGUMENT

I.

The affidavits set forth sufficient allegations to justify a finding that the action of defendant in making the assessment and levying against appellant was arbitrary and oppressive.

Without restating the affidavits, they clearly indicate that appellant was an old, uneducated and very ill man, who was induced to rely upon a person whose interest was completely adverse to his own, so far as proper determination of any tax liability, if any, could be made and that these facts were known to defendant. While appellant in no wise contends that defendant is charged with determining the good faith of representatives of taxpayers, appellant does respectfully submit that defendant cannot close its eyes to such a clear abuse in taxpayer's representation in the determination of any tax liability. At no time was appellant permitted to introduce evidence that his representation before defendant was unconscionable, and that defendant at all times was aware of this. That there was at least some semblance of equity in appellant's position is indicated, first, by the restraining orders issued by the Courts below and, more particularly, by the statement of the Court (Tr. page 53) in one of the hearings. More precisely, the statement of the Court (Tr. page 53) that "Someone is being stubborn about it on the part of the Government . . ." clearly sets forth the equitable issue.

At no time has the defendant been willing to discuss this case administratively, as set forth in Transcript page 15, which was admitted by the defendant (Tr. page 53) and, in fact, the defendant reneged on a promised review of the matter (Tr. page 18) and further refused to review the matter even after the suggestion and request of one of its local officers (Tr. page 19) for administrative review was carried to the Commissioner of Internal Revenue and was refused prior to filing of the initial complaint (Tr. page 19).

The allegations show that the Appellant was a very ill man from an operation for cancer; that he has no means of support; that his only worldly goods either had been seized or liened against by defendant, making precarious his operation of the ranch to sustain himself, and for medical treatment, and that he would suffer irreparable loss from the action of the defendant.

II.

The defendant's assessment against appellant was a jeopardy assessment pursuant to Section 273(a), 1939 Internal Revenue Code, and was invalid because of his failure to issue a statutory notice as required by Section 273(b), 1939 Internal Revenue Code.

Assuming, arguendo, that the defendant could have issued the assessment based on the Waiver form 870-TS, as provided in Section 272(d), 1939 I.R.C., the affidavits allege that, in fact, the assessment was made under Section 273(a), 1939 I.R.C., which pro-

vides for the making of a jeopardy assessment. Subsection (b) of that section provides that in such an assessment, the statutory notice must be issued. Whether or not the assessment was a jeopardy assessment is principally a question of fact, which was clearly recognized by the Court below in its statement in the hearing disposing of defendant's motion for summary judgment (Tr. page 52). Appellant was prepared to introduce evidence that the time element between the issuing of the assessment and the making of the lien was contrary to the administrative practice of defendant on assessments made pursuant to Section 272(a), 1939 I.R.C., and clearly substantiated the making of a jeopardy assessment under Section 273(a), 1939 I.R.C. That defendant did not issue the statutory notice provided in either Section 272(a) or Section 273(b), 1939 I.R.C., is stipulated (Tr. page 52). The issuance of the statutory notice is of extreme importance to the appellant, because only then will jurisdiction be conferred on the Tax Court of the United States, so that taxpayer's liability to defendant, if any, and which appellant denies, would be judicially determined.

It is ironic that defendant so strenuously resists any judicial determination, while at the same time it would suffer no impairment, in any respect, of the statute of limitation or full recovery of the tax, if any, that might be due defendant.

Defendant has contended that the assessment, even if invalid as a jeopardy assessment, would have been valid based on the Waiver form 870-TS. Appel-

lant respectfully submits that it is not what could have been done but what actually was done that governs.

III.

The assessment made by defendant was invalid under the rule of this court, because there was no determination before signing nor was there issuance of the statutory notice by defendant.

This Court has held, in *Mutual Lumber Co. v. Poe*, 66 Fed. 2d 904; *McCarthy Co. v. Commissioner*, 80 Fed 2d 618, that waivers under Section 272(d), 1939 I.R.C., which is the statutory authority for the Waiver form 870-TS at issue, signed before the determination required under Section 272(a), 1939 I.R.C., were invalid and, more importantly, that such waivers did not deny a taxpayer the right to go to the Tax Court for which a statutory notice is jurisdictional. That such notice was not issued was stipulated by the defendant (Tr. page 52). That the determination was not made prior to the waivers dated November 2, 1949, is alleged in the affidavit (Tr. page 12) and is further evidenced by the photostatic copy of such waiver attached by defendant in its motion dated April 13, 1953, in support of its motion to dismiss that action, at the bottom of which is typed "This copy to be retained by Petitioner", indicating that appellant failed to receive his copy allegedly after insertion of the amounts. Regretably, this photostatic copy was omitted from the transcript but would be available as evidence.

The rule of this Circuit is contrary to that of the First Circuit in its case of *Associated Mutuals, Inc. v. Delaney*, 176 Fed. 2d 179, in which it held that this Court's reliance upon the law rather than administrative practice was in error. This case did, however, (as well as the decision by the Third Circuit in *Victory v. Manning*, 128 Fed 2d 415), hold that the validity of the waiver should be determined before disposing of the case on the ground of lack of jurisdiction under Section 3653(a), 1939 I.R.C.

This Court's position is well supported by the Senate Finance Committee Report, 69th Cong., First Sess., S. Rept. 52, which stated that the purpose of Section 272(d), 1939 I.R.C., which is the statutory provision for the Waiver form 870-TS at issue, is as follows:

“In order to permit the taxpayer to pay the tax and stop the running of interest, the Committee recommends in Section 274(d) of the bill, (272(d), 1939 Internal Revenue Code) that the taxpayer at any time be permitted to waive in writing the restrictions on the Commissioner against assessing and collecting the tax but without taking away the right of the taxpayer to take the case to the Board, (now the Tax Court).”

The language of this report and the Code provision indicates that this is an unilateral action by the taxpayer; and, while it waives the restrictions on assessment and collection, it does not waive the right to litigate the liability in the Tax Court.

It is noteworthy that the defendant took the position of the appellant in the McCarthy case, *supra*.

The rule adopted by this Court also is well set out in *East Bay Water Co. v. McLaughlin*, 24 F. Supp. 222. It is noteworthy that this Court's position is adopted in the 1954 Internal Revenue Code, sec. 6212(a), and section 6213, subsection (d) referring to subsection (a) only.

The attention of this Court respectfully is invited to the prayer for rescission, (Tr. page 6), of the Waiver form 870-TS, in addition to the prayer for injunction. It is respectfully submitted that rescission is not barred by Section 3653(a), 1939 Internal Revenue Code, and may properly be done upon the equities alleged in this action.

CONCLUSION

The action of the Courts below denied to the appellant the opportunity to adduce evidence that, in fact, a jeopardy assessment was made and that, in fact, the assessment was not validly made pursuant to the rule of this Court. Appellant, uneducated, aged, ill and infirm from a cancer operation, is threatened with complete destitution by the action of defendant. He was placed in this position by representation before defendant by one whose interests were completely inimical to that of appellant, knowledge of which by defendant appellant believes he can prove. Appellant was rebuffed by defendant in any administrative redress and sought this action as the only means of preventing irreparable loss. Administrative action of the defendant has denied to appellant his right to a judicial determination of

his tax liability, if any, because of the invalidity of the assessment made, so held under rule of this Court, or the invalidity of the assessment as a jeopardy assessment. A rescission of the waiver or an injunction against the defendant would not impair the rights of defendant to proceed pursuant to the provisions of the Internal Revenue Code and the rule laid down by this Court.

DATED at Stockton, California, this 24th day of February, 1955.

Respectfully submitted,

SEAMAN & DICK,

By Wareham Seaman

(Attorneys for Appellant.)

